In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1562

LT. FREDERICK JONES, PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

Petitioner, an Air Force officer convicted by court-martial, contends that his punishment—forfeiture of $250 pay per month for six months—is sufficiently restrictive of his liberty so as to place him "in custody" for purposes of federal *habeas corpus*.

After a trial by general court-martial, petitioner—a Second Lieutenant in the United States Air Force—was convicted of failure to do monitor duty, in violation of Articles 92 and 134 of the Uniform Code of Military Justice (10 U.S.C. 892, 934). He was reprimanded and received a fine of $250 per month for six months, to be forfeited from his pay check.[1] After exhausting his military remedies, he sought *habeas corpus* relief under 28 U.S.C.

[1]The sentence was approved and ordered into execution on March 6, 1973.

2241 in the United States District Court for the District of Arizona on the ground that the court-martial proceedings had violated his constitutional rights. The district court dismissed the case for lack of jurisdiction (Pet. App. B), and the court of appeals affirmed (Pet. App. A), holding that "[t]he custody requirement for federal *habeas corpus* relief has not been so far expanded as to encompass the fine imposed upon [petitioner]."

Petitioner contends that even though he has never been incarcerated or physically confined as a result of his offense, the fine imposed against him is enough in itself to satisfy the "custody" requirement of 28 U.S.C. 2241. The courts, however, have uniformly rejected the notion that the imposition of a fine is a "custodial" punishment. See *Westberry* v. *Keith*, 434 F. 2d 623 (C.A. 5); *Hooper* v. *Hartman*, 274 F. 2d 429 (C.A. 9); *Goldstein* v. *Johnson*, 184 F. 2d 342 (C.A. D.C.), certiorari denied, 340 U.S. 879. See also, Cushman, *The "Custody" Requirement for Habeas Corpus*, 50 Mil. L. Rev. 1, 16-17 (1970). Indeed, in *United States* v. *Augenblick*, 393 U.S. 348, in which servicemen convicted by courts-martial brought suits in the Court of Claims for back pay, this Court observed that *habeas corpus* was "not available to [one of the respondents] because he was discharged from the service, not imprisoned" (393 U.S. at 350).[2]

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[2]The cases on which petitioner relies do not support his position. In *Glover* v. *State of North Carolina*, 301 F. Supp. 364 (E.D. N.C.), a *habeas* petition was filed after the challenged sentences had been served, but while the petitioner was incarcerated because of subsequent, unrelated offenses. The court pointed out, *inter alia*, that the convictions which petitioner claimed to be invalid would likely be considered by a parole board in determining when to release petitioner from the then-current imprisonment (301 F. Supp. at 366). *Morgan* v. *Thomas*, 321 F. Supp. 565 (S.D. Miss.), reversed on other grounds, 448 F. 2d 1356 (C.A. 5), certiorari denied, 405 U.S. 920, involved a challenge to a state court order directing that the petitioner be fined and imprisoned until he purged himself of contempt. Shortly after the filing of the petition, he was in fact arrested.

Contrary to petitioner's assertions (Pet. 10-11), there has never been any possibility of incarceration because of default. As the court of appeals observed (Pet. App. A), "[n]o provision of the sentence permits incarceration for nonpayment of the fine." Additionally, nonpayment was impossible because the amount due was automatically forfeited from petitioner's pay checks. Moreover, even if at the time the petition for *habeas corpus* was filed there was some speculative possibility that noncompliance with the court-martial decree might lead to incarceration, *habeas corpus* review would still have been unavailable.[3] See Cushman, *The "Custody" Requirement for Habeas Corpus, supra,* 50 Mil L. Rev. at 16-17; *Hensley* v. *Municipal Court*, 411 U.S. 345, 351-252.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

JULY 1974.

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[3]For these reasons, petitioner's point (Pet. 8) that the fine was not entirely paid when he first sought *habeas* relief has no significance.